Yesterday's Children, Inc. and Office & Professional Employees International Union, AFL—CIO. Cases 1–CA–29621 1–CA–29740, 1–CA–30297, and 1–CA–30428

July 17, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On June 30, 1994, Administrative Law Judge Russell M. King Jr. issued the attached decision. The General Counsel filed exceptions and a supporting brief and an answering brief in response to the Respondent's cross-exceptions. The Respondent filed cross-exceptions and a supporting brief and an answering brief in response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, ¹ findings, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

The facts are fully set forth in the judge's decision. Briefly, the Respondent operates facilities for mentally retarded adults. Jean Smith, a registered nurse, began her employment with the Respondent in 1985. Laura Cunningham, a nursing assistant, began working for the Respondent in June 1988. Jeffrey Cake took over as the Respondent's executive director in January 1992. When Cake took over, the Respondent had been experiencing various financial, managerial, and licensing problems.

II. VIOLATIONS

1. The complaint alleges, inter alia, that the Respondent violated Section 8(a)(1) by: unlawfully interrogating employee Laura Cunningham; threatening her with discipline for engaging in protected concerted activity; and issuing a written reprimand to her in retalia-

tion for her engaging in protected concerted activity. The judge dismissed the allegations. For the reasons set forth below, we disagree with the judge's findings regarding the threat and the issuance of a written reprimand. However, for the reasons set forth below, we agree with the judge that Cake's questioning of employee Cunningham on June 12 was not an unlawful interrogation.

A. Interrogation

We agree with the judge that Cake's questioning of Cunningham was not coercive of Section 7 rights. The Respondent heard a rumor of a walkout and was simply trying to ascertain whether the rumor was true. As an operator of a health care institution, the Respondent had a legitimate and substantial interest in ascertaining the truth concerning this matter. The question was unaccompanied by threats or promises. Finally, there was, in fact, no intention to walk out. In these circumstances, we do not find any interference with the asserted Section 7 right to engage in a walkout. Our dissenting colleague analogizes this case to Providence Hospital, 285 NLRB 320 fn. 2 (1987). The case is clearly distinguishable. In that case, the union gave an 8(g) notice to strike, and the employer interrogated employees about whether they would join the strike. By contrast, in the instant case, the Respondent was seeking information about whether there was to be a strike, i.e., whether the strike rumor had any foundation. The employee was not asked to reveal her sentiments, i.e., whether she would join the strike. She was asked only if she had heard the strike rumor.³

B. Threat and Reprimand

Cunningham and nurse Jean Smith attempted to start a letter writing campaign to the Respondent's board of

¹We find that the judge properly denied the Respondent's Motion to Amend its Answer and to Supplement the Record and its Brief and find no merit in the Respondent's exception to this ruling. The Respondent contends that, in light of the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp. of America*, 114 S.Ct. 1778 (1994), it should be allowed to amend its answer to deny that charge nurse and alleged discriminate Jean Smith is an "employee" under Sec. 2(3) of the Act and that she is, instead, a supervisor, a manager, or both. We find that the Respondent's contention is untimely because it was not raised either in the pleadings or at the hearing. *California Pacific Signs, Inc.*, 233 NLRB 450 (1977). See also *Opportunity Homes*, 315 NLRB 1210 (1994).

² All subsequent dates are 1992 unless indicated otherwise.

³Contrary to her colleagues, Member Browning would find that Cake's questioning of Cunningham was an unlawful interrogation in violation of Sec. 8(a)(1). The Board previously has emphasized that there are circumstances in which a health care employer may ask employees if they intend to participate in a strike following a union strike notice pursuant to Sec. 8(g). The employer, however, is required to explain the purpose of the questions, reassure employees against reprisals, and refrain from creating a coercive atmosphere. Providence Hospital, supra. In this case, no such steps were taken. The interrogation, which was assertedly to confirm a rumor of a walkout at the facility, was conducted by the Respondent's executive director in his office. The inquiry involved Sec. 7 activity, and no assurances were given that reprisals would not be taken. Contrary to her colleagues, Member Browning perceives no basis, either in Board law or otherwise, for giving any significance whatsoever to whether the purported "rumor" was true or false. The point is that the Respondent asked a unit employee about a rumor of protected activity in circumstances that were inherently coercive, and such an interrogation would have a reasonable tendency to interfere with, restrain, and coerce that employee and others from pursuing protected activity. Member Browning would, therefore, find that Jeffrey Cake's June 12 interrogation of Laura Cunningham regarding possible protected activity violated Sec. 8(a)(1).

directors on behalf of a supervisor, Glenda Leavitt, who had been laid off by Cake on June 11. On June 13, Cunningham called Lucinda Sargent, a fellow employee, at Sargent's home. Cunningham asked Sargent to write a letter on Leavitt's behalf and also stated during the course of the conversation that they had to "get rid of Cake, this asshole."

The next day Sargent reported the telephone call to her supervisor who, in turn, reported it to Cake. Cake discussed the call with Sargent and concluded that, inter alia, Cunningham was "out to get [him] . . . fired." On June 15, Cake wrote Cunningham a letter stating that her telephone call to Sargent, if true, was cause for dismissal or other disciplinary action and that she was to report to his office on June 17. The two met, and Cake concluded, based on their conversation, that Cunningham was not merely trying to foster support for Leavitt, but was also trying to get him fired. On June 18, Cake wrote Cunningham a formal reprimand for making the June 13 telephone call.

We find, contrary to the judge, that Cake's threatening Cunningham with discipline in his letter of June 15 and his reprimanding her on June 18, violated Section 8(a)(1). The judge found that Cunningham's efforts on behalf of Leavitt were concerted and protected. The Respondent argues only that these efforts lost the protection of the Act because (1) Cunningham made derogatory remarks about Cake and sought his discharge; and (2) Cunningham was using a company phone during company time when she made the remarks about Cake.

Contrary to the judge, we do not find that Cunningham's activities lost the protection of the Act either because (1) the conversation contained derogatory remarks about Cake, or (2) the conversation alluded to the discharge of Cake, or (3) the telephone call was made during working time from the nursing station. First, we find that Cunningham's derogatory comments are not so egregious as to cause her to lose the protection of the Act. See for example Severance Tool Industries, 301 NLRB 1166 (1991) (calling the president a "son-of-a-bitch" during discussions of vacation pay held protected). Compare, New Process Gear, 249 NLRB 1102, 1108 (1980). Moreover, we find the Respondent has failed to establish that it disciplined Cunningham because she made the telephone call during working time from a company telephone. In fact, we find the evidence clear that the Respondent disciplined Cunningham for the content of her call, not because of when and where it was made. Concededly, Cunningham said that she wanted to get rid of Cake. However, the prime focus of Cunningham's efforts was to secure reinstatement for Leavitt, not to secure the discharge of Cake. Finally, there is no evidence that Cunningham took any steps to secure the discharge of Cake. In our view, employees who are engaged in Section 7 activity in protest of actions by their employer do not lose the protection of the Act simply because they mention that they dislike an employer manager and would like to see the manager discharged.

2. The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) with regard to employee Jean Smith by issuing her two written reprimands, discharging her, and subsequently prohibiting her from returning to the Respondent's premises. For the reasons set forth below, we find that the written reprimands of Smith and her subsequent discharge violated Section 8(a)(1).⁴

The facts surrounding the Jean Smith incidents, as more fully set forth by the judge, are summarized as follows.

Jean Smith, a registered nurse, was hired in 1985. Before Cake's arrival in early 1992, Smith had never received a reprimand or any other form of discipline. On January 22, soon after Cake's arrival, the employees submitted a petition to him protesting the termination of a fellow employee. Smith's signature was on the top of the first column of signatures. On February 5, Smith and Cake became engaged in a heated discussion over a memo issued by Cake stating that employees' paychecks would be withheld because of a cashflow problem. On February 6, Smith was reprimanded for her comments to Cake during the February 5 discussion. Smith appealed the reprimand, and it was subsequently withdrawn by Cake. On June 11, Supervisor Glenda Leavitt was laid off. On June 13, Smith, along with other employees, began planning a letter writing campaign in support of Leavitt.

On July 10, as more fully discussed in the judge's decision, Smith and Dale Zebulske, the person hired to replace Leavitt, were talking when Smith observed two residents. Smith remarked that "—resident is choking—resident." Zebulske apparently took Smith's word at face value and assumed that she would make out a written report. Zebulske, contrary to established policy, then informed the mother of one of the residents who was involved in the "incident." Smith was verbally counseled over the incident, which became known as the "choking incident."

On July 12, Smith and Leavitt contacted the Union. On July 14, the Respondent's board of directors met at a local hotel to hear Leavitt's appeal of her dismissal. Smith was one of three employees permitted to meet with and address the Board. During the meeting,

⁴We agree with the judge that the Respondent did not unlawfully prohibit Jean Smith from entering the facility to visit residents after the discharge, but we rely solely on the fact that the General Counsel did not meet its burden of proving unlawful motivation for the Respondent's action.

⁵Smith testified she was only joking when she made the comment. Although the judge found that no actual choking took place, he also found that Smith told Zebulske that it had.

union representatives distributed literature to the employees outside the hotel.

On July 16 and 17, the "sunburn incident" occurred. Briefly, a resident was severely sunburned and Smith applied a prescription cream for which the resident, admittedly, did not have a prescription. Smith noted the treatment in the incident report and the 24-hour notebook, but not in the medical logbook or the nursing notes. She also informed Starbuck, the nurse on the shift following hers, of the resident's condition. The next day, the patient was put in a whirlpool bath which caused the sunburn to blister badly.

On July 27, representatives from the State Department of Human Resources arrived, unannounced, to investigate the choking and sunburn incidents as well as other incidents. Regarding the choking incident, the state representatives concluded that there were "holes" in the Respondent's investigation and that there was a "great possibility" that Zebulske had misinterpreted Smith concerning the choking incident. As to the sunburn incident, the investigator concluded that the resident had not been treated for 16 hours.⁶

On July 28, Smith attended a union meeting with 15 other employees and signed an authorization card. Elizabeth Goss, the Respondent's director of nursing, testified that she was told on July 29 that there had been a union meeting the day before and that Smith had attended. The testimony is uncontradicted that on July 29, Goss told Cake that a union meeting had taken place the night before. There is, however, a conflict whether Cake was told that Smith had attended the meeting.⁷

On August 4, Smith was given a written reprimand allegedly for the sunburn and choking incidents.⁸ Cake discharged Smith on August 10 for her failure to treat the sunburn patient and because of her "false report" concerning the choking incident.

The judge found that the General Counsel failed to establish a prima facie case that Smith's protected activity was a motivating factor in the Respondent's decision to discharge her. We disagree.

In Wright Line,⁹ the Board set forth its causation test for cases alleging violations of the Act that turn on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support

the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. The elements commonly required to make out a prima facie case of discriminatory motive are protected activity, knowledge, timing, and animus. If the employer's asserted reasons for the discharge are found to be false, the Board may infer that there is another, unlawful reason for the discharge.¹⁰

Smith engaged in a variety of protected activities detailed above, which came to the Respondent's knowledge. The actions taken against Smith were in close proximity to the Respondent learning of her protected activity. 11 The Respondent's animus toward Smith's protected activities in particular, and its employees' protected activities in general, is clear. First, the judge found, and we essentially agree, that Cake acted out of "personal dislike" for Smith. We disagree with the judge that this factor supports the Respondent's defense. We find, rather, that it supports the General Counsel's case. Cake's dislike of Smith arose initially from Cake's resentment of Smith's protected activities. (i.e., Smith's participation in the petition to Cake protesting an employee's termination and Smith's protest regarding the withholding of employee paychecks). Thus, as Cake's dislike began from animosity over protected activity, we infer that this "dislike" was a product of animus toward Smith's protected activity.¹² Further, the violations of Section 8(a)(1) found supra, firmly establish the Respondent's and Cake's animus in general toward its employees' protected activities. Therefore, we find that the General Counsel has established a prima facie case that Smith's protected activity was a motivating factor in the Respondent's decision to discipline and discharge her.

Having found that the General Counsel has established a prima facie case, the burden shifts to the Respondent to show that it would have disciplined and discharged Smith even in the absence of her protected activity.

⁶A subsequent investigation concluded that Smith had, in fact, treated the patient.

⁷The judge should have resolved the conflict, inasmuch as it was important to the resolution of the 8(a)(3) allegation. However, in view of our finding that the discharge violated Sec. 8(a)(1), we do not believe that a remand is required or warranted.

⁸ Smith was on vacation from July 17 through August 4.

⁹251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Although *Wright Line* involved conduct which violated Sec. 8(a)(3), the Board applies the same analysis to cases involving conduct alleged to have violated Sec. 8(a)(1). See *Bronco Wine Co.*, 256 NLRB 53 (1981).

¹⁰ Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466 (9th Cir. 1966).

¹¹ We note that on July 14, just 4 days after the choking incident and 2 days before the sunburn incident, Smith appeared before the Respondent's board of directors and read a prepared letter supporting terminated Supervisor Leavitt and complaining about some of Cake's recently instituted policies. Although the record is not clear whether Cake actually attended this meeting, we infer that he, as the Respondent's executive director, had knowledge of Smith's participation.

¹² See Letter Carriers (Postal Service), 315 NLRB 1176, 1178 fn. 10 (1994). (Where animosity begins in response to protected activity but escalates because of personal disputes, the Board will view that animosity, absent a showing to the contrary, as based on animus toward protected activity.)

Cake stated that his reasons for reprimanding and subsequently discharging Smith were that she did not display "consistent good judgment in [her] duties and responsibilities" with respect to the "sunburn" and "choking" incidents. We find that these reasons are pretextual, and that the Respondent has failed to show that it would have taken the same action in the absence of Smith's protected activity.

Regarding the August 4 reprimand for the July 10 choking incident, we note the following. Zebulske was at least equally responsible for the consequences by improperly informing the patient's mother of the "nonevent," which, in part, triggered the State's investigation. Zebulske, however, was not disciplined at all. Moreover, Smith's reprimand stated that it was being given at the suggestion of Barnes, a state patient advocate. Barnes, however, testified that he did not suggest that Cake increase Smith's discipline from the original verbal counseling. Rather, Barnes testified that he told Cake that he believed that the incident was caused by a misunderstanding on Zebulske's part, and not by any misconduct by Smith.

We also find pretextual Cake's August 4 reprimand of Smith for the sunburn incident. Cake described the incident which occurred on July 17, as "abuse." Cake, however, did not discipline Smith until August 4. Cake then claimed to have made his decision on July 28 based on the formal report of the State's investigators. Cake stated that this report found that Smith had engaged in "abuse" by willfully neglecting the patient's sunburn. This report, however, did not issue until August 19, 9 days after Smith's discharge. Further, neither this report nor any other record evidence concludes or suggests that Smith engaged in any willful neglect or abuse of a patient. Moreover, the state report referred to by Cake listed several deficiencies at the facility including, inter alia, the sunburn incident, the failure to treat a patient's ear infection, and the improper administration of a psychotropic drug, admittedly the most serious infraction. Yet, the only employee who was disciplined for any of these incidents was Smith. Finally, the Respondent did not discipline employee Starbuck, who, according to the state report allegedly relied on by Cake, also neglected to treat the patient for sunburn.

Smith's discharge was allegedly based upon the same incidents as her reprimands, which, as we have already found, were a pretext. It follows then that the reasons given by Cake for her discharge were pretextual as well.

The judge correctly found that the Respondent's actions against Smith were not warranted and that the Respondent was "really out to get Smith." He found, however, that the two incidents, along with Cake's "personal dislike" for Smith, resulted in her discharge. We find the judge's finding flawed on two

grounds. First, as stated above, we find that the reasons given for Smith's reprimands and subsequent discharge were a pretext and that the actual reason for the Respondent's actions against Smith were her protected activities. Moreover, even assuming, arguendo, that the reasons for Cake's actions were his "personal dislike" for her, we find, as previously noted, that this animosity grew out of Smith's protected concerted activity and, as such, amounts to hostility to protected activity.

Accordingly, having found that the General Counsel established a prima facie case warranting an inference that Smith was reprimanded and subsequently discharged for her protected concerted activity, and having found that the Respondent's explanations for its actions were pretextual and that the actual reason for Smith's reprimands and discharge were her protected concerted activities, we conclude that the Respondent violated Section 8(a)(1) by reprimanding and subsequently discharging Smith.

AMENDED REMEDY

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully discharged Jean Smith, we shall order that the Respondent offer her immediate reinstatement to her former job or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority and other rights and privileges, and to remove from its files any reference to the discharge and to notify the discriminatee in writing that this has been done and that these actions will not be used against her in any way. Sterling Sugars, Inc., 261 NLRB 472 (1982). We shall also order the Respondent to make Smith whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with F. W. Woolworth Co., 90 NLRB 289 (1950), with interest as prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Yesterday's Children, Inc., Ellsworth, Maine, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Threatening and reprimanding employees for engaging in protected concerted activity.

¹³ Shattuck Denn Mining Corp., supra.

- (b) Discharging employees for engaging in protected concerted activity.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, offer Jean Smith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision
- (b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful reprimands and discharge of Jean Smith, and within 3 days thereafter notify the employee in writing that this has been done and that the reprimands and discharge will not be used against her in any way.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful reprimand of Laura Cunningham, and within 3 days thereafter notify her in writing that this has been done and that the reprimand will not be used against her in any way.
- (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its facility in Ellsworth, Maine, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at

its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 10, 1992.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten or reprimand you for engaging in protected concerted activity.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jean Smith full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful reprimands and discharge of Jean Smith, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the reprimands and discharge will not be used against her in any way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful reprimand of Laura Cunningham, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the reprimand will not be used against her in any way.

YESTERDAY'S CHILDREN, INC.

Michael T. Fitzsimmons, Esq., for the General Counsel.

Clare Hudson Payne, Esq. (Eaton, Peabody, Bradford & Veague, P.A.), of Bangor, Maine, for the Respondent.

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

DECISION

STATEMENT OF THE CASE

RUSSELL M. KING JR., Administrative Law Judge. These consolidated cases were heard by me in Ellsworth, Maine, on October 6, 7, and 8, 1993. The charges were filed by Office & Professional Employees International Union, AFL—CIO (the Union). Based on these charges, complaints were issued by the Regional Director for Region 1 of the National Labor Relations Board (the Board), on behalf of the Board's General Counsel. The complaints allege various violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) between mid-June and mid-November.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND THE LABOR ORGANIZATION

The pleadings, admissions, and evidence in the case establish the following jurisdictional facts. Yesterday's Children, Inc. (the Respondent) is a nonprofit corporation which operates three separate programs for mentally retarded adults. One is a 20-bed nursing facility in Ellsworth, Maine, which is the only facility involved in this case. During the calendar year ending December 31, the Respondent, at its Ellsworth facility, derived gross revenues in excess of \$250,000. During that same calendar year, the Respondent also purchased an received, at its Ellsworth facility goods and materials valued in excess of \$5000 directly from points outside of the State of Maine. Thus I find, as admitted, that the Respondent, at all times material, was an employer engaged in com-

merce within the meaning of Section 2(2), (6), and (7) of the Act.

Further, as alleged and admitted, I find that the Union has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Brief History

The Respondent, in 1991 and part of 1992 had experienced various financial, managerial, and licensing problems. Ina January, Jeffrey Cake was hired and took over as executive director (chief dministrator). On June 11 Cake laid off popular supervisor, Glenda Leavitt, the program director or qualified mental retardation professional (QMRP), because he found that she lacked the required state qualifications for the position. After Leavitt's layoff, there was a move by some employees to support the appeal of Leavitt's layoff, and there was also a rumor of a walkout over the layoff. On July 6, Cake replaced Leavitt with Dale Zebulske as QMRP. Registered Nurse Jean Smith was a strong Leavitt supporter, and on July 12 she and Leavitt met with representatives of the Union regarding organizing the Respondent's employees. On July 14 the Respondent's board of directors heard Leavitt's appeal (which was denied). At the appeal, approximately 30 employees gathered outside, and union representatives were also present, distributing union literature. On August 10 Nurse Jean Smith was discharged for alleged professional misconduct. On October 28 a Board-conducted election was held at the Ellsworth facility. The Union ultimately prevailed and was certified on January 12, 1983. The alleged unfair labor practices took place during the turmoil that followed Leavitt's layoff (June 11), during the union campaign, and up until several weeks after the union election (mid-November).

B. The Interrogation, Threats, and Reprimand of Laura Cunningham in June (Case 1–CA–29621)

Laura Cunningham had worked for the Respondent as a nursing assistant since June 1988.⁴ After hearing the walkout rumor, on June 12 Cake called several employees into his office and asked them if they had heard such a rumor. Present during these interviews was Cake's administrative assistant, Sheila Guthrie. Cunningham was one of those employees called in by Cake, and she testified that Cake told her, "anybody that did walkout would be terminated for abuse." During his testimony, Cake denied making the threat, and in her testimony Guthrie corroborated Cake's denial. No other employee testified regarding their June 12 interview with Cake.

The General Counsel contends that Cake's questioning of Cunningham about a walkout constituted unlawful interrogation under *Johnnie's Poultry Co.*⁵ I disagree. There was no

¹ All dates hereafter are in 1992 unless otherwise indicated.

²The term "General Counsel," when used, will normally refer to the attorney in the case acting on behalf of the General Counsel of the Board, through the Regional Director. In Case 1–CA–29621, the initial charge was filed August 10, an amended charge was filed September 12, and the complaint was issued on September 29. In Case 1–CA–29740, the initial charge was filed September 16, an amended charge was filed October 23, and the complaint was issued on November 12. In Case 1–CA–30297, the initial charge was filed on March 12, 1993, an amended charge was filed May 25, 1993, and the complaint was issued on May 25, 1993. In Case 1–CA–30428, the initial charge was filed on April 22, 1993, an amended charge was filed June 2, 1993, and the complaint was issued on June 30, 1993. By order of the Regional Director, the cases were consolidated for hearing on June 30, 1993.

³ The pertinent parts of the Act (29 U.S.C. § 151 et seq.) read as follows:

Sec. 8(a). It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7—

⁽³⁾ by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Sec. 7. Employees shall have the right to self- organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

⁴During her testimony, Cunningham was asked if she was an active union supporter between June and November, to which she answered, "[Y]es." Other testimony in the case clearly establishes the Union was first contacted July 12, and its presence was first displayed July 14 outside of Leavitt's appeal hearing before the Respondent's board of directors.

⁵ 146 NLRB 770 (1964). Here the Board held it improper to question employees about their union adherence and activities for the asserted purpose of defending unfair labor practice charges then being investigated by the Board. The General Counsel also cites *Dennett Continued*

union involvement at the time, and it was later established that the rumor was started by an employee of another concern who had accepted some of the Respondent's residents for their day program. There was also no evidence that any of the Respondent's employees ever actually discussed or contemplated any walkout or work stoppage. I thus find that Cake's questioning of Cunningham on June 12 was not unlawful interrogation in violation of Section 8(a)(1) of the Act as alleged in the complaint. Cake's alleged discharge threat "for abuse" rests solely on credibility determinations between Cunningham, Cake, and Guthrie, which I resolve in favor of Cake. I find that Cunningham had, as did Nurse Jean Smith, an intense dislike of Cake, and she thought of him admittedly as an "asshole." This, together with the fact that no other employee who was questioned by Cake on June 12 testified in the case (much less about such a threat), leads me to question her credibility in this instance. I thus find that no such threat was made by Cake to Cunningham on June 12 in violation of Section 8(a)(1) of the Act as alleged in the complaint.

Nurse Jean Smith and Cunningham attempted to start a letter writing campaign to Respondent's board of directors on behalf of Supervisor Leavitt who had been laid off by Cake on June 11. On June 13 Cunningham, in the presence of Smith, called nurses assistant Lucinda Sargent at home, to ask her to support Leavitt. The call was made from the nursing station, not from the employees' phone, and was made either at about 5 or 7 p.m. Cunningham and Smith testified that the call was made at approximately 7 p.m., and Sargent testified that the call was between 5 and 6 p.m.6 Cunningham testified that when she initially called Sargent, her phone was malfunctioning, and they hung up and Sargent called back, and that both she and Smith talked to Sargent. In her testimony, Sargent did not mention talking also to Smith, and remembered only one phone call. Smith testified that she did also talk to Sargent then, asking her to write a letter for Leavitt. Sargent also testified that she was busy fixing dinner for her four children, but indicated that Cunningham wanted "to get some kind of petition or get everybody together in support by Glenda [Leavitt] and to nail Jeff [Cake] to the wall." Cunningham testified that later in her conversation with Sargent, she "mentioned the fact that [the] Union had been talked about," but Sargent did not verify this in her testimony.7 Finally, Cunningham admitted that during the phone conversation with Sargent she said that they had to "get rid of Cake, this asshole.'

The following day (June 14), Sargent complained to her supervisor, Gayle Haslam, about Cunningham's phone call, and Haslam then reported it to Cake, who in turn discussed the call with Sargent. Cake testified that Sargent "indicated to [him] that she had been harassed" by Cunningham "in" the phone call, and that it became apparent to him (Cake)

that Cunningham "was out to get [him] . . . fired . . . and was using the agency's resources to do it." Cake added that he "certainly did" feel it was possible that Cunningham could cause his dismissal because the previous administrator had been forced to resign because of "staff action." Thus, on June 15 Cake wrote Cunningham a letter stating that her call to Sargent, if true, was just cause for dismissal or other formal disciplinary action, and requested that Cunningham report to his office on June 17 at 1:30 p.m. to discuss the matter. Cake testified that after meeting with Cunningham, he determined that the phone call to Sargent was made between 5 and 6 p.m. (as Leavitt, had claimed), and that Cunningham (as he had earlier concluded) was not merely supporting, but was trying to get him fired. Cunningham testified that at the meeting Cake asked her about the phone call and that at first she told him the call had been "for personal reasons," but then admitted it was to gain support for Glenda Leavitt. According to Cunningham, Cake then "didn't say much," but indicated he would "discuss some verbal counseling for [her]" with one "Karen Smith who was the DTC for the evening." On June 18 Cake wrote Cunningham a letter of "formal reprimand" for "conduct unbecoming" regarding the phone call to Sargent on June 13. Apparently Cake was never told of any alleged involvement of Jean Smith in the phone call, as her name was never mentioned by Cake, or by Cunningham during her interchanges with Cake about the incident.

The complaint alleges that Cake's June 15 letter to Cunningham was an unlawful threat to discipline employees for engaging in protected concerted activities and, that Cake's letter of June 17 was an unlawful reprimand, all in violation of Section 8(a)(1) of the Act. I disagree. I discredit Cunningham's testimony that she mentioned the Union during her phone conversation with Sargent. I also find it unnecessary here to determine whether Smith also actually talked with Sargent during the conversation (as Cunningham claimed). Smith and Cunningham obviously disliked Cake and his new regime, and they both sought to have Leavitt reinstated and, at a minimum, put Cake in his place. Cake, on the other hand, somewhat childly (but honestly) feared for his job. Cunningham's phone call to Sargent was improper because it was a personal call made during working time from the nursing station phone, rather than the employee's phone. But what bothered Cake the most, understandably, was the derogatory remarks about him, in this setting. His response may have not been completely appropriate, but was not unlawful. That part of Cunningham's call to Sargent regarding support for Leavitt could be considered protected concerted activity, if taken alone, but other aspects of the call (which bothered Cake the most) clearly divorced the call from any activity protected under the Act. Likewise, I find that Cake's letters of June 15 and 17 to Cunningham did not constitute an unlawful threat or reprimand.

C. The Jean Smith Matter—Her Warning, Discharge, and Prohibition from Returning to the Facility (Cases 1–CA–29740 and 1–CA–30297)

On June 10, Nurse Jean Smith was at the nurse's desk. Smith testified she was sitting down when QMRP Dale Zebulske (who had been hired July 5 to take Leavitt's place)

Road Manor Nursing Home, 295 NLRB 397 (1989), which I find not to be applicable here. In that case the Board found unlawful the polling of employees about their willingness to work in the event of a strike

⁶Sergant testified that the residents at Respondent are given their evening meal between 4 or 4:30 and 6 p.m.

⁷ Here again, Cunningham claims she mentioned the Union, which in fact did not come on the scene until mid-July. Smith was not asked whether Cunningham mentioned the Union to Sargent during the conversation.

⁸ No Karen Smith testified in the case.

approached her and the two engaged in conversation. Smith indicated she then saw a resident in a wheelchair coming down the hall whereupon another resident ran abruptly up to the wheelchair resident who then raised his hands and said, "No." Smith related that she then stood up and leaned around Zebulske to better observe the two residents, and after determining that nothing had happened between the two residents, she sat back down and commented to Zebulske that it had "looked like one resident might have been choking another." Zebulske testified that he was walking to his office when he observed Smith leaning over her desk and remarking, "[resident] is choking [resident]." Zebulske indicated that he looked and saw both residents, but while he saw no physical contact himself, he assumed that a choking had taken place, and also that Smith, as the "charge nurse," would make a written report of the incident, and he thus "kept on walking." Zebulske testified that later that day he talked by phone with the mother of the alleged choking victim to reschedule a meeting with her, and during the conversation he mentioned the choking incident (which Smith claimed never happened). The resident's mother complained and there was a subsequent investigation. According to Smith, Zebulske later requested her to make out an incident report regarding the matter to satisfy licensed social worker, Philip Hurley, who was "quite angry" that the matter had been reported to the resident's mother, but she refused explaining that "there was no choking incident and that it was a joke." However, on July 16 Smith did write up an explanation of the incident at the request of Acting Director of Nursing Joan Abbott. On July 21 Director of Nursing Elizabeth Goss, who had been on vacation, verbally counseled Smith over the incident and in her written confirmation of that counseling, under "Policy or Policies Violated" Goss stated, "This was a case of poor judgment and of speaking before thinking of the consequences." At the time of the counseling, Smith was on vacation, but had gone back to get her paycheck. On July 27, three representatives from the State Department of Human Services arrived unannounced to conduct an investigation about the choking incident and another incident also involving Smith (the "sunburn" incident, which will be addressed later in this decision), after anonymous complaints had been received. On August 4, after the state investigation was completed,9 Director of Nursing Goss issued Smith a written reprimand over the choking incident. At this time, Smith and Leavitt had already contacted the Union (on July 12) and Leavitt's appeal hearing had been held (July 14), at which Smith appeared on behalf of Leavitt. Goss herself admitted that on July 29 she knew Smith had attended a recent union meeting. The reprimand recites in part that the "Regional Advocate was very concerned about the issue of your judgment and not satisfied with the administrators recommendations of counseling." The regional advocate was James Barns, one of the three state representatives. Barns testified that he did not tell Cake to increase the discipline of Smith over the choking incident. Barns indicated that on July 27 he talked only with Zebulske and Cake

(and not Smith) about the incident and felt that "there were some holes in the internal investigation . . . a great possibility the Mr. Zebulske either misinterpreted [Smith] or failed to follow through at the time in question." Barns also testified that Cake however felt Smith did tell Zebulske that there was choking, but that Smith was fabricating the incident and was only "joking," a term that Smith herself had used.

And now, the sunburn incident. On July 16, staff member Verna Chick told both Cake and Smith that a resident had come back from his day program with a sunburn. At Cakes direction, Chick filled out an "incident report." 10 Smith was told because she was the charge nurse on the shift beginning at 4 p.m. Smith testified that she treated the sunburn with Silvadine ointment, a prescription burn cream, which had been prescribed for another resident, because she was busy with other residents and meals, and she felt that she could not obtain a prescription for the burn resident quickly.¹¹ Smith testified that she then made a notation of the treatment on the incident report that Chick had initiated at Cake's request, and signed it.12 Smith also indicated that she made a notation in the "24-hour notebook" used by nurses to record "little important items that happened in their shift." 13 However, Smith conceded that she did not note the incident in the "medical logbook," and forgot to make an entry in the "nursing notes." The charge nurse on the next shift (12-8 a.m., July 17) was Benedict Starbuck, and Smith told him about the sunburn. Starbuck testified that during his midnight rounds he checked the sunburn resident, saw that the sunburn area was "red," but that the resident was asleep, and he "saw no major concern." On the following shift (8 a.m.-4 p.m. on July 17) the charge nurse was Virginia Conklin. Starbuck testified that he told Conklin that there were "a number of sunburns and that . . . a particular client's shoulder . . . was a little redder than everybody else's." ¹⁴ Smith testified that she went on vacation on July 17. It is not clear from the record whether her vacation began at the end of her

⁹ Before the state representatives left after the investigation on July 27, an exit conference was held and a handwritten list of deficiencies was prepared and signed by Registered Nurse Bonnie Lou Stone on behalf of the Department of Human Services, who was one of the representatives (or investigators). There were some five deficiencies, including the sunburn incident. The choking incident was not listed.

¹⁰ This report is captioned "CLIENT/INCIDENT REPORT," and among the entries Chick made on the report was "R shoulder down his back, sunburned." Near the bottom of the report is a space for "supervisors comments" and "supervisors signature."

¹¹Former employee nurse Peter Rosenburg testified that Goss had told him to use Silvadine from a file cabinet in her office when a resident had sunburn. Rosenburg, who had been discharged by the Respondent in July (1992), conceded that the instructions form Goss were improper. Nursing assistant Clare McEwen testified that there was a jar of Silvadine in a drawer in the kitchen. In any event, all involved in the case agreed that proper (and written) policy was to obtain the particular residents own prescription (and drug) for treatment.

¹² Smith's entry, under "supervisors comments" reads as follows: Employers "Re: shoulder was quite sunburn-Employers cannot allow this to happen to the clients. Silvadine oint applied to relieve discomfort." Cake testified that when he saw the incident report the following day (July 17), Smith's signature was there but there were no comments. Nurse Virginia Conklin, who took over two shifts later (early morning on July 17), at first testified that she was uncertain about seeing Smith's comments, but later testified that Smith's comments were there. However, her testimony was somewhat tenuous in this regard.

¹³ The page out of the 24-hour notebook for the 4 p.m.–12 a.m. shift on July 16 does reflect that Smith made a notation about the sunburn, and signed it.

¹⁴ Many of the Respondent's residents were on medications which rendered them more vulnerable to the sun.

shift (12 a.m.) when Starbuck took over, or at the end of her shift the following day (July 17). She remained on vacation until August 4. At the beginning of Conklin's shift (8 a.m., July 17), the resident in question took a whirlpool bath with the help of nursing assistant Lucinda Sargent, who noticed the sunburn which she testified was "really bad." Sargent reported this to her supervisor, Gayle Haslam, who reported it to charge nurse Conklin, and in turn Conklin reported it to Cake. Conklin then ordered a prescription for Silvadine for the resident from the local hospital, and Cake had pictures taken of the sunburn (which did not turn out).15 Cake testified that when Conklin came to him, she stated that the resident had blistered as a result of being placed in the bathtub, and if she had known about the sunburn she "never would have put him into the bathtub."16 Bonnie Lou Stone, a registered nurse, was one of the three state representatives that came to the Respondent's facility on July 27 unannounced, to investigate anonymous complaints, including the sunburn incident. Stone prepared and signed the statement of deficiencies that day. Regarding the sunburn, the statement reads "Client suffered a sunburn resulting in blisters on left shoulder and not treated for over 16 hours."17 Stone testified that during her investigation she talked to OMRP Zebulske, Director Cake, a "couple of staff members," and she thought charge nurse Conklin. She did not talk to Smith, and did not mention that she talked with Starbuck or Sargent.¹⁸ Stone testified that she also examined nursing notes, medication administration records, and the incident report that Verna Chick had prepared, containing Smith's comments and signature, and wherein Smith had indicated treatment with Silvadine ointment. In concluding that the sunburned resident had not been treated for 16 hours, Stone testified that she disregarded the incident report because the report "was not dated by [Smith]," and no entries were made in the nursing notes or the medication and administration records (which Smith conceded she did not make entries in). In fact the incident report date blanks at the top had been filed in by Chick "DATE: 7-16-92 TIME: 4:00," and there is no date space at the bottom where the supervisor's comments and signature (of Smith) appeared.

On her return from vacation August 4, Smith was also given a written reprimand over the sunburn incident. The reprimand states in part "Your failure to note [the sunburn] within [the resident's] medical records or examine him carefully, resulted in his being placed in the whirlpool on July 17, 1992, which caused the sunburn to raise into visible blisters . . . which caused the agency to be cited . . . you failed to properly act, both interns of record keeping and in terms of making recommendations to the nurse assuming duty after your shift." On July 28, the day after the State investigation, Cake and Director of Nursing Goss discussed Smith, and Cake then decided to discharge Smith, but Goss persuaded Cake to issue letters of reprimand instead, telling Cake that she would try to convince Smith to resign. Goss indicated that she thereafter did not do this because she did not want to be accused of retaliating against Smith because of Smith's union activity, which she claimed she learned about on July 29. Goss also indicated that she never told Cake about Smith's union involvement, or that she never asked Smith to resign, although she knew Cake would discharge Smith. By letter of August 10, Cake discharged Smith because of the reprimands over the "choking" and "sunburn" incidents, and by virtue of his personal observation of her conduct.¹⁹ The discharge letter also recites "you have not demonstrated consistent good judgment in your duties and responsibilities as a Professional Registered Charge Nurse, either in your direct Supervision of other staff, or with regards to persons whom we provide services to." Smith appealed her discharge to the Respondent's president of its board of directors, Berell Kornreich, who upheld the discharge by letter to Smith dated September 1. In that letter Kornreich cites Smith's lack of good judgment in the choking incident, in that Smith stated that one client "appeared to be or was seen by you choking another client . . . [and that she, Smith] later told several people that you did not mean what you had said to be taken literally, or that it was a joke." Kornreich took more seriously the "sunburn" incident in which he assumed (or concluded) that Smith had treated the resident with Silvadine (contrary to Cake's stated belief and that of Bonnie Lou Stone), but Kornreich found the fact that Smith had done so without obtaining the residents own prescription "a more serious breach of good nursing judgment, as well as a violation of the Maine Nursing Code." In the letter, Kornreich made mention of the fact that Smith had failed to note the treatment in the medication recordbook and had made a "late entry" (on August 5) in the nursing notes without further explanation.²⁰ Kornreich's September 1 letter also accuses Smith of having had "a pattern and practice of treating residents with prescription medications without obtaining a proper physician's order and without making proper nursing notations."21

Smith and Cake disliked each other. They had problems early in Cake's tenure. On or about January 22, an employee petition was submitted to Cake, requesting the reinstatement of an employee that Cake had discharged. Some 33 employ-

¹⁵ Sargent, who had worked for the Respondent for 6 years, testified that she had never seen pictures taken of sunburn, but that the sunburn at issue was as bad as she had ever seen. Conklin described the sunburn as "pretty well blistered at this point."

¹⁶ Charge nurse Starbuck, on the contrary, testified that at the end of his shift, he told Conklin about the sunburn. Cake heard the testimony of both Starbuck and Conklin, and during his testimony, Cake was asked whether he wanted to reconsider his testimony regarding what Conklin said to him, and he replied, "No." Conklin denied that she ever had any conversation with Cake regarding the incident. Nursing notes Conklin made on July 17 refer to the sunburn and there is an additional notation that "Incident report found to be made out by J. Smith, RN for 7/16/92."

¹⁷ Some record entries indicate "left shoulder" and some indicate "right shoulder." The weight of the evidence from those directly involved appears to favor the "right" shoulder.

¹⁸ Although Smith was on vacation, there is nothing in the record to indicate she was unavailable by phone or otherwise. On July 21, Smith had come to the facility to pick up her paycheck. Stone testified that she did not attempt to talk to Smith because she was not on duty, adding that "I think she was on vacation, but I'm not sure of that."

¹⁹ As seen above, and as will be found later here, some of the conclusions in the reprimands themselves were unsupported by the facts and evidence.

 $^{^{20}}$ This, in fact, was true. The day after Smith returned from her vacation, and after the written reprimands, she made such an entry in order to correct her earlier admitted failure.

²¹ The record does not support this accusation.

ees had signed the petition, and Smith's was the first signature. On February 5 they had a heated discussion regarding a memo Cake had issued informing employees that a week's pay would be withheld because of cash-flow problems. On February 6 Cake reprimanded Smith over her remarks the previous day. Smith appealed the reprimand, and Cake subsequently withdrew it. Since her employment began at Respondent in 1985, Smith had never been reprimanded.

Regarding the choking incident on June 10, its hard to imagine that Zebulske reported the choking of a resident to the resident's mother without honestly thinking it happened. Also, Smith's testimony was inconsistent. She indicated that she told Zebulske there was no choking, but later indicated that she was joking. Joking about what? Although I find that in fact no choking took place, I find that Smith told Zebulske that it had. When Zebulske told the resident's mother about the incident, the matter went beyond resurretion. The resulting verbal counseling of Smith was probably enough, even considering the subsequent State involvement, however, with no resulting citation. But Cake later went further with a written reprimand some 2 months later (August 4), piling it on with the "sunburn" written reprimand to insure Smith's demise, whether by resignation or discharge.

Now, on to "sunburn" facts and evidence. Here, it was really out to get Smith time. First, I find that Smith did treat the sunburn with Silvadine, but with another resident's medicine, as she admits.²² Smith then told the next shift charge nurse Starbuck about the sunburn, and Starbuck looked in on the resident through the night. The next shift began at 8 a.m. on July 17. The charge nurse was Conklin. Here the problems started. With Conklin's consent, the sunburn resident was allowed to be placed in a hot whirlpool bath under the direct supervision of nursing assistant Sargent, causing the sunburn to badly blister. Conklin lied in this case. She claimed no knowledge of the sunburn, and so told Cake (which she also falsely denied). Conklin had seen the incident report initiated by Chick (at Cake's direction), and completed by Smith. Conklin even made a note of the incident report in her nursing notes for July 17, a detail that Conklin was not asked about during her testimony. Starbuck had also told Conklin about the sunburn at the end of his shift, when Conklin came on. Conklin had made a professional nursing mistake in allowing the sunburn resident to enter the hot whirlpool, and upon the blistering, she knew it. She then tried to cover herself, promptly and properly ordering the resident's own Silvadine and denying that she knew of the sunburn (which Cake had known about since the afternoon before). From the beginning Cake and State investigator Stone took the approach that Smith had not treated the resident. The only persons spoken to by Stone who were directly involved were Cake and possibly Conklin. She did not interview Sargent, Starbuck, or Smith, whose unavailability was not shown. In her conclusions, Stone completely disregarded Smith's comments in the incident report for, in my opinion, no adequate reasons. Cake hedged, claiming that when he reviewed the incident report, he saw only Smith's signature. The powers that be at the Respondent were so intent on getting Smith that they even named the wrong shoulder in several records. Those that knew, Sargent, Smith, and Starbuck, accurately designated the right shoulder.

Now, I go to the matter of whether Smith's two reprimands on August 4 and her discharge on August 10 were violative of Section 8(a)(3) and (1) of the Act. Most employee activities in support of a union are protected by the Act unless they are prohibited by law, or a valid employer rule. Adverse retaliation by the employer because of said protected concerted activities, is usually unlawful. As indicated earlier Smith and Cake disliked each other, and Cake wanted to get rid of Smith, which he did. Now the questions is whether the discharge, based on the two reprimands, was for honest and legitimate business, or personal reasons, or were those reasons given as a pretext for discharging Smith for some protected and concerted activity in which she engaged. The General Counsel cites the petition signed by Smith in January, her complaints to Cake in February about the pay withholding, her support of Leavitt's reinstatement in mid-June, and her attendance at a union meeting on July 28.23 In my opinion, these events or actions by Smith played no role in Cake's decision to reprimand and discharge her, even assuming Cake's knowledge of Smith's union support.²⁴ In this case the General Counsel, by a preponderance of the evidence, must make a prima facie showing sufficient to support the inference that conduct protected under the Act was a motivating factor in Cake's discharge of Smith. The burden then shifts to the Respondent to demonstrate that the discharge would have taken place notwithstanding the protected conduct.²⁵ I find that the General Counsel failed to make a prima facie case regarding Smith's reprimands and discharge. Smith's actions in the "choking" and "sunburn" incidents did prompt, in part the state investigation. I find that this, together with Cake's personal dislike for Smith, resulted in her discharge. For what it is worth, I do feel somewhat for Smith. She took a bad rap over the "sunburn" incident. Conklin and Sargent were not without fault in the matter. It is my hope that the Respondent will, in some way correct this.

The complaint in Case 1–CA–30297 alleges that "since about October, 1992" the Respondent has unlawfully prohibited Smith from entering the Respondent's facility to visit residents because Smith, with other employees, engaged in the protected concerted activity of testifying on behalf of Glenda Leavitt at an internal hearing held by the Respondent on July 14. Smith testified that about August 15 she went back to the facility to leave a letter asking for her personnel file, and was asked to leave by Zebulske. Smith indicated that with the exception of going back once thereafter to retrieve something from a car in the parking lot, she never returned to the facility, or tried to return for any reason, much less to see residents. Additionally, Smith never indicated that she would have liked to have gone back to visit residents.

²² The Respondent's board president, Kornreich, also so concluded. All agree in this case that it is improper to treat one resident with another's medication, but I find that it had been done before. Sunburn was far from a rare occurrence.

²³ Director of Nursing Goss testified that she found out about Smith's attendance at the union meeting on July 29, but did not tell this to Cake. Cake affirmed that Goss did not tell him. The General Counsel would have me discredit both Goss and Cake in this regard. ²⁴ Curiously, there is scent evidence in the record shout the prior

²⁴ Curiously, there is scant evidence in the record about the union activities of any employee, much less that of Smith, or about the union campaign itself.

²⁵ Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Smith also testified that she remembered one employee, whose name she could not remember, and whose "employment had ceased or terminated," who was let back into the facility. Former charge nurse Peter Rosenburg, who had been discharged in late July for the alleged abuse of a resident, testified that he was told by "one of the employees" that he was prohibited from visiting the facility. There is simply no evidence to support the allegation in the complaint in Case 1–CA–30297. I note also that the charge was filed on March 12, 1993, almost a month after the 6-month period had elapsed since Zebulske told Smith not to return in mid-August.

D. The Mid-November Hunt for Brenda Snow, Solicitation of False Statements About Brenda Snow, the Implied Threats of Discharge, and the Call of Off-Duty Employees Cunningham and White (Case 1–CA– 30428)

The complaint in Case 1–CA–30428 alleges that about November 15, Zebulske, in the presence of other employees, attempted to locate employee Brenda Snow after she called in sick, because of her union activities, and that Zebulske, about November 18, solicited employees to sign false statements against Snow because of her union activities. The complaint also alleges that about November 18, Zebulske impliedly threatened to discharge employees because of their union activities, and that the Respondent, about November 15, required off-duty employees Laura Cunningham and Anne White to come into work because of their union activities and support.²⁶

Nursing assistant Brenda Snow had worked for the Respondent for over 5 years and had supported the Union "very strongly and had several [union authorization] cards signed from other employees." Snow testified that on the morning of November 15 she went to the facility and told charge nurse Conklin that she would be unable to work that day. Snow indicated she did not have a "doctor's note," nor was she asked for one. When Snow left she went to Dunkin' Donuts. Nursing assistant Karen Cobb testified that on November 15 Zebulske called her at home explaining there was a "call-out" and that he had to order people in, and had the authority to do so from Cake. Cobb related that her husband had overheard the conversation, and in the background he stated that he had seen Brenda Snow at the Dunkin' Donuts. According to Cobb, Zebulske, after overhearing her husband's remark, told her that Snow "was the one that walked out," and the conversation ended. Cobb testified that a few days later and at the facility, Zebuske asked her to write a letter stating that she "had seen Brenda Snow," and she refused because she had not seen Snow and "her husband really didn't know if it was Brenda Snow." Cobb also indicated that the Dunkin' Donuts was about a 2-minute drive from the facility. Zebulske testified that on the evening of November 14 he and his wife were visiting relatives when he received a phone call from mental training coordinator Karen Smith who told him there was a staff shortage and that there were "many concerns regarding care of the clients." Zebulske related that he went by the facility that night to check on things, and the following morning (Sunday, November 15) at 9:30 a.m. he received a phone call at home from Cake who

indicated he had heard from the charge nurse that she was "down a couple of people" for the direct care 2-10 p.m. shift, and Cake asked him to go in and straighten out the situation and order people in if he felt it was necessary. Zebulske testified that he then went to the facility and talked to charge nurse Conklin, who told him she had "tried all the per diem folks [but] there was nobody available." Zebulske indicated that he then looked for employees who normally worked direct care on the 2-10 p.m. shift and were off, and came up with employees Cunningham and White. Zebulske called White and ordered her into work, and she complied, but Zebulske was unable to reach Cunningham because of an "inaccurate" number, and he then went to Cunningham's house with Sargent "as a witness," and ordered Cunningham to work, and Cunningham complied.²⁷ Zebulske testified that he was aware that Snow had earlier reported to Conklin at the facility and left, and having overheard Cobb's husband state that he saw Snow at the Dunkin' Donuts, he and Sargent (again, as a "witness") left Cunningham's house and went to Dunkin' Donuts to tell Snow that she needed a doctor's note to get paid for that date. Zebulske indicated that he took Sargent to Dunkin' Donuts as a witness "to avoid confusion." When Zebulske arrived with Sargent at Dunkin' Donuts, Snow had already left. Zebulske admitted he did talk to Cobb in his office after the November call-ins and asked Cobb to document their phone conversation on November 15 when her husband mentioned he had seen Snow at the Dunkin' Donuts, because Cake had been "encouraging us to document when things happen because it avoids hysteria," and he was just passing Cake's advise onto Cobb. Zebulske denied that he asked Cobb to prepare a statement that she had seen Snow at Dunkin' Donuts. Zebulske conceded that the call-in situation was "very unusual" and had never happened in the past while he had worked for the Respondent. Developmental training coordinator, Gayle Haslam, testified that in the evening of November 14 charge nurse Eddie Dennison called her at home and was "really upset" because they were "short staffed," and that another staff person had just had an injury and had to go to the "ER," adding that he had "called everybody and nobody would come in." Haslam then went to the facility, where she remained for 2-1/2 to 3 hours. Haslam added that in the meantime, Karen Smith was able to get Cindy Wilcox and Kathy Folson to come in.²⁸ Cake also came in Sunday morning (November 15) and in his testimony he confirmed his directions to Zebulske. Cake testified that he became convinced there had to be more staff on duty to ensure a "safe environment for our residents," adding that he (himself) ordered Karen Smith into work after he learned that she had refused Goss' request to come in.²⁹ Cake testified that on Monday, November 16, he sent a letter to the State Department of Human Services,

²⁶ The balance of the allegations in the complaint were withdrawn.

²⁷ Both White and Cunningham had been union supporters. White testified that she had signed a union authorization card and that during the union campaign she had worn "shirts and pins." Cunningham testified that she attended "just about all of the union meetings," "wore sweatshirts and T-shirts at times," and was "very vocal" about her support for the Union.

²⁸ Dennison, Smith, Wilcox, and Folson did not testify in the case. Haslam testified that she was a member of the bargaining unit, and that her husband was a member of the Respondent's board of directions.

²⁹ In her testimony Goss verified this.

as he was obligated to do in such cases of "operational" problems, explaining the situation at the facility on Saturday and Sunday (November 14 and 15), and what had been done about it. According to Cake, the events of the weekend had resulted in "34 pages of reports." Also on Monday, Cake issued a memo to all the staff indicating that he did not like ordering staff into work, but an "emergency" situation had forced him to do so.

The weekend of November 14-15 at the facility was an unusual one, and I find that indeed an emergency situation did exist. Off-duty employees were needed, but many refused to come in. It became apparent to Cake that he would have to order employees to come in. Cake was hired to shape up the facility, and the weekend events were far from satisfactory for Cake. Zebulske, as Cake's lieutenant, was determined to serve his commander well, and to use his newly delegated authority with gusto. His given reason for searching out Snow at the Dunkin' Donuts (to tell her she needed a doctor's note to get paid) was unbelievable. In my opinion, he went there (with his "witness") hoping to find (or catch) Snow and order her into work, not because Snow had supported the Union, but because she had been part of the cause for the problems which arose at the facility that weekend. Regarding his conversation with Cobb several days later, I find it incredible to believe that he asked Cobb to give him a statement that it was she who told him of Snow's whereabouts, and not her husband, in the background. Cobb either misunderstood Zebulske, or lied. I do not find that any of the call-ins over the weekend were discriminatory. The union election was in the past (October 28) and the Union had won. There were approximately 50 employees in the unit involved, over half of which voted for the Union. I find it hard to believe that Zebulske singled out White and Cunningham for their union support, and in addition to White and Cunningham, at least three other employees were ordered in, after many had been asked to come in but refused. I do not here condone Zebulske's actions or methods, which appear to me to have been a bit gestapoish, but I do not find that he picked on Snow, White, and Cunningham because of their union support.

Upon the foregoing findings of fact and initial conclusions, and upon the entire record, I hereby make the following

CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent did not violate the Act as alleged in the consolidated complaints issued.

[Recommended Order omitted from publication.]